SUNGEI WAY LEASING SDN. BHD.

v.

SENA LAND DEVELOPMENT SDN. BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 22-3-88]
12 MAY 1989

CIVIL PROCEDURE: *Application for summary judgment - As at date of application no appearance entered yet - Shadowy defences raised - Conditions to be in imposed when granting leave to defend - Observations on whether O. 14 applications should be heard in open Court.*

This was an application by summons in chambers for summary judgment under O. 14 Rules of the High Court 1980 arising out of a claim based upon a breach and repudiation of a contract of sale and purchase of a secondhand Nigata N.P. Asphalt Plant ("the equipment"). By an agreement in writing dated 20 March 1985, entered into between the plaintiff and the defendant, the plaintiff agreed to sell and the defendant agreed to purchase the equipment at the price of RM664,120 payable by an initial forfeitable deposit of RM36,000 on execution of the agreement, a second payment of RM64,000 on or before 31 March 1985 and a final payment of RM564,120 on or before 31 May 1985. It was, a term and condition of the agreement that the ownership and title of the equipment shall remain vested in the plaintiff until the full payment of the purchase price.

Although there was a dispute as to whether the defendant owed a balance of RM558,128 as contended for on behalf of the plaintiff or RM474,120 as contended for on behalf of the defendant, so that the questions which remained to be litigated between the parties was the difference between these sums and the issue of ownership of the equipment. At the end of the argument, Counsel for the plaintiff confined his contention to seeking summary judgment for repossession of the equipment which was the primary relief prayed for in the application. In the alternative, he sought to contend that the defendant be given leave to defend conditional upon it delivering the equipment to the plaintiff to hold as security pending the trial of the action subject to the undertaking that the plaintiff will not part with the same save in accordance with any order of Court and so to preserve the *status quo*.

Held:

[1] There was no substance in the contention of the defendant that the application for summary judgment was premature in that at the date of its issue no appearance had as yet been entered, because it was clear the defence had waived the irregularity by taking a step in the proceedings, to wit, by filing a defence and moreover, at an earlier hearing Counsel for the defendant had appeared and argued the application on its merits. In any event, the Court had a discretion to condone the irregularity under O. 2 r. 2 which the Court chose to exercise since a dismissal of the application on such a ground would merely have served to delay the proceedings and add to the costs.

[2] Having regard to the definition of a bill of sale in the Bill of Sale Ordinance 1950, there was not a scrap of evidence to support the contention that the sale and purchase agreement was an unregistered bill of sale and not being in the statutorily prescribed form, was void for lack of registration although, of course, evidence at the hearing may prove otherwise.

[3] It was common ground that the defendant has not paid a cent towards the substantial balance still owing since November 1985, whilst still enjoying the use of the equipment, which was a profit yielding chattel. In the absence of a satisfactory explanation - and the Court did not consider there was any - these were facts from which it could be inferred that *prima facie* the defendant's worth was in doubt and that its defence was lacking in good faith. At the end of the day, the Court was of the view that the defences raised were shadowy that it was very nearly ready to give the plaintiff summary judgment under O. 14. Accordingly, it was considered that whilst the defendant should be granted leave to defend, the Court should, in the exercise of its discretion, impose conditions, to the order granting leave.

[4] In all the circumstances, the Court exercised its discretion by imposing the condition that unless the defendant delivered to the plaintiff possession of the equipment not later than 4 p.m. on 10 March 1989, to be held by the plaintiff, pending the final determination of the action, the plaintiff be at liberty to enter final judgment against the defendant for possession of the equipment and delivery of the same by the defendant to the plaintiff forthwith, with damages to be assessed and costs of the action to be taxed.

Observation by the Court:

> On reflection, having regard to the ruling of Steyn J in *Shell International Petroleum Company Limited v. Transnor (Bermuda) Ltd.*, an authority which was not cited to me, and a commentary thereon appearing in the Civil Justice Quarterly (Vol. 87 April 1988, pp. 89-91) and which I perused only after pronouncing my decision in the present case, I should, perhaps, have conducted the entire hearing in open Court....the editors of the **Civil Justice Quarterly** have gone further and advocated that as a matter of principle, the general practice should be the hearing of O. 14 applications should be in open Court unless the Judge otherwise orders... But, if the recommendations aforesaid are implemented in this country, then it would appear that the Registrar of the High Court (which expression includes a Senior Assistant Registrar), whose jurisdiction is circumscribed by O. 32 r. 9, would be precluded from hearing applications for summary judgment, and this would to the burden of over crowded judicial lists of Judges of the High Court. Perhaps, this appeal will provide the opportunity for the Supreme Court to afford guidance on this practice point.

Cases referred to:
Ionian Bank Ltd. v. Couvreur [1969] 1 WLR 761
Paclantic Financing Co Inc v. Moscow Narodny Bank Ltd. [1984] 1 WLR 931
Vann Lynn Development Ltd. v. Pelias Construction Co Ltd. [1969] 1 QB 607
Ward v. Plumbley [1890] 6 TLR 198
Rosensgrens Ltd. v. Safe Deposit Centres Ltd. [1984] 1 WLR 1334
Pilings v. Kent Investments Ltd. [1986] 4 Con LR 393
Shell International Petroleum Company Limited v. Transnor (Bermuda) Ltd. [1987] 1 WLR Lloyd's Rep 363

Legislation referred to:
Rules of the High Court 1980, O. 2 r. 2, O. 14 r. 1(1), O. 32 r. 9

For the plaintiff - Richard Tallala, (G. Chan with him); M/s. Lim Kean Siew & Co.
For the defendant - Yeap Chye Choon; M/s. Yeap Chye Choon & Co.

JUDGMENT

Edgar Joseph Jr J:

This was an application by summons in chambers for summary judgment under O. 14 arising out of a simple and straightforward claim based upon a breach and repudiation of a contract of sale and purchase of a secondhand Nigata N.P Asphalt Plant ("the equipment"). By an agreement in writing dated 20 March 1985, entered into between the plaintiff and the defendant, the plaintiff agreed to sell and the defendant agreed to purchase the equipment at the price of RM664,120 payable by an initial forfeitable deposit of RM36,000 on execution of the agreement, a second payment of RM64,000 on or before 31 March 1985 and a final payment of RM564,120 on or before 31 May 1985. It was a term and condition of the agreement that the ownership and title of the equipment shall remain vested in the plaintiff until the full payment of the purchase price.

Although there was a dispute as to whether the defendant owed a balance of RM558,128 as contended for on behalf of the plaintiff or RM474,120 as contended for on behalf of the defendant, so that the questions which remained to be litigated between the parties was the difference between these sums and the issue of ownership of the equipment, at the end of the argument, Counsel for the plaintiff confined his contention to seeking summary judgment for repossession of the equipment which was the primary relief prayed for in the application. In the alternative, he sought to contend that the defendant be given leave to defend conditional upon it delivering the equipment to the plaintiff to hold as security pending the trial of the action subject to the undertaking that the plaintiff will not part with the same save in accordance with any order of Court and so to preserve the *status quo*.

Counsel for the defendant begins by taking a procedural point. He contends that the application for summary judgment was premature in that at the date of its issue no appearance had as yet been entered, contrary to O. 14 r. 1(1), I did not consider that there was substance in this point because it was clear the defence had waived the irregularity by taking a step in the proceedings, to writ, by filing a defence and moreover, at an earlier hearing counsel for the defendant had appeared and argued the application on its merits. In any event, I was of the view that I had a discretion to condone the irregularity under O. 2 r. 2 which I chose to exercise since a dismissal of the application on such a ground would merely have served to delay the proceedings and add to the costs. I felt that in the circumstances, what mattered was the merits of the application.

It was next contended by Counsel for the defendant that although Clause 12 of the sale and purchase agreement made time for the instalment payments the essence of the contract so that full payment had to be made by 31 May 1985, yet the plaintiff had accepted nine late instalment payments after that date, thus waiving the breaches arising therefrom. Thereafter, it was said that the plaintiff ought to have, but did not serve the defendant with a notice reimposing the requirement that time be made the essence of the agreement, with the result that the plaintiff's action was premature.

In view of the stand taken by Counsel for the plaintiff, I did not consider this submission of Counsel for the defendant of any relevance at this stage of the proceedings. Different considerations might have arisen if the money claim was being pursued in the application but here I was concerned with a claim for possession of the equipment.

What however was at the heart of the application was the provision of Clause 10 of the sale and purchase agreement, that ownership and title to the equipment shall remain vested in the plaintiff until the full payment of the balance purchase price. Such retention of title clauses

- known as Romalpa clauses - are common place in commercial contracts but their effectiveness is subject to satisfactory negotiation of a combination of technical aspects of the law of sale of goods, bailments, trusts, mortgages and tracing.

I hasten to add, however, that I did not overlook the submission of Counsel for the defendant that the machinery being a fixture, ownership thereof accrued with the land on which it stood. However, when I asked Counsel, during the argument, if the land concerned was his client's property, he was not in a position to say that it was. It is an established principle, too well known to need citation of authority, that generally, a wrongdoer cannot set up the *jus tertii*, so that even if it were true that the equipment was indeed a fixture (and there was no evidence of this) I did not consider that a triable issue had been raised thereby. Another defence raised was that the sale and purchase agreement was an unregistered bill of sale and not being in the statutorily prescribed form was void for lack of registration. There was not a scrap of evidence to support this contention having regard to the definition of a bill of sale in the Bills of Sale Ordinance 1950. But, of course, evidence at the hearing may prove otherwise.

Furthermore, it was common ground that the defendant had not paid a cent towards the substantial balance still owing since November 1985, whilst still enjoying the use of the equipment, which was a profit yielding chattel. In the absence of a satisfactory explanation - and I did not consider there was any - these were facts from which I could infer that *prima facie* the defendant's worth was in doubt and that its defence was lacking in good faith.

At the end of the day, I was of the view that the defences raised were so shadowy that I was very nearly ready to give the plaintiff summary judgment under O. 14.

In *Ionian Bank Ltd. v. Couvreur* [1969] 1 WLR 761, the Court of Appeal in England, being satisfied that the defence raised by the defendant was not a sham, nevertheless took the view that it had little or no substance and "the case was almost one in which summary judgment should be ordered" (per Davis LJ at p. 788) and was described as so "shadowy" that the Judge was right in giving leave to defend only on condition that the full amount should be brought into Court (per Denning LJ at p. 787). See also *Paclantic Financing Co. Inc. v. Moscow Narodny Bank Ltd.* [1984] 1 WLR 931 and *Vann Lynn Development Ltd. v. Pelias Construction Co. Ltd.* [1969] 1 QB 607.

Accordingly, I considered that whilst the defendant should be granted leave to defend, I should in the exercise of my discretion, impose conditions, to the order granting leave.

In deciding what conditions I should impose, I recognised that any conditions I imposed should be reasonable. Just as it was important to ensure that a defendant is not deprived of his right to defend if he has an argument worth listening to, so it is equally important not to deprive him of that same right by imposing conditions on the grant of leave with which he is quite unable to comply. (See *Ward v. Plumbley* [1890] 6 TLR 198).

As to the mode of security, I recognised that almost invariably the plaintiff's position is secured by an order requiring the defendant to pay a specified sum into Court. Nevertheless there would seem to be no objection to other forms of security which have a similar effect such as a bank guarantee or a solicitor's undertaking. (See *Rosensgrens Ltd. v. Safe Deposit Centres Ltd.* [1984] 1 WLR 1334). In *Pilings v. Kent Investments Ltd.* [1986] 4 Con LR 393, the Court of Appeal, having formed the opinion that the defendants' contentions were "somewhat shadowy, but just sufficient" ordered them to provide security for the plaintiff's claim to the extent of 70,000 pounds by way of a bank guarantee as condition of staying proceedings pending the determination of the dispute by arbitration.

Now, it was alleged by Counsel for the plaintiff, and not challenged by Counsel for the defendant, that the plaintiff was incurring costs in keeping the equipment under surveillance and, that taking the circumstances of the case as a whole, the appropriate condition to impose was that unless the defendant delivered to the plaintiff possession of the equipment not later than 4 p.m. on 10 March 1989, to be held by the plaintiff pending the final determination of the action, the plaintiff be at liberty to enter final judgment against the defendant for possession of the equipment and delivery of the same by the defendant to the plaintiff forthwith, with damages to be assessed and costs of the action to be taxed. Counsel for the defendant made no attempt whatever to oppose the condition proposed by Counsel for the plaintiff.

In all the circumstances, and after careful consideration, I exercised my discretion by making an order in the terms proposed by Counsel for the plaintiff.

That is sufficient to dispose of this case but, in the wider interests of justice, there is a practice point of very considerable importance to which I should like to advert and it is this.

The hearing of the O. 14 summons before me was conducted partly in chambers and partly in open Court for convenience.

On reflection, having regard to the ruling of Steyn J in *Shell International Petroleum Company Limited v. Transnor (Bermuda) Ltd.* [1987] 1 WLR Lloyd's Rep 363, an authority which was not cited to me, and a commentary thereon appearing in the Civil Justice Quarterly (Vol. 87 April 1988, pp. 89-91) and which I perused only after pronouncing my decision in the present case, I should perhaps, have conducted the entire hearing in open Court. The passage in the judgment of Steyn J to which I should like to refer reads as follows:

> The sole question for decision is whether the plaintiffs are entitled to summary judgment. In the usual way the matter was due to be heard in chambers. In such matters Commercial Court hearings are held in chambers as a matter of convenience. But in my judgment it was not appropriate, in the light of the defendants' allegations, for the matter to be heard in chambers. In the circumstances the hearing took place in open Court and my judgment is being given in open Court.

It is true that the reason the learned Judge gave for conducting the proceedings in open Court was because of the nature of the allegations made by the defendant against the plaintiff; namely serious charges of financial and commercial misconduct involving conspiracy. In this case, no doubt, no such allegations were made. But, the editors of the Civil Justice Quarterly have gone further and advocated (see p. 91 *ibid*) that as a matter of principle, the general practice should be that the hearing of O. 14 applications should be in open Court unless the Judge otherwise orders. Their reasoning being:

> It should be generally realised that applications for summary judgment under O. 14 have the character of a trial on the merits, though without the benefits of prior discovery or cross-examination. They cover a wide range of subject matter and their very conduct and content qualify them to be in the public domain. The public has a continuing and abiding interest in the open system of civil justice and all the more so in proceedings which may lead to a final judgment in the matter. There is nothing confidential in the disputes between the parties that are dealt with on the hearings for summary judgment and there is no reason in principle why they should continue to be held in private, i.e. in chambers. It would add greatly to increasing the sense of confidence of the public in the administration of civil justice if, as a start, the hearings of applications for summary judgment under O. 14 before the Judge were to be held in open Court unless the Judge otherwise orders.

But, if the recommendations aforesaid are implemented in this country, then it would appear that the Registrar of the High Court (which expression includes a Senior Assistant Registrar,) whose jurisdiction is circumscribed by O. 32 r. 9 would be precluded from hearing applications for summary judgment, and this would add to the burden of overcrowded judicial lists of Judges of the High Court. Perhaps, this appeal will provide the opportunity for the Supreme Court to afford guidance on this practice point.

Also found at [1989] 2 CLJ 871